No. 92-1608

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

LORETTA BOWMAN, WILLIAM H. BOWMAN, WILLIAM H. BOWMAN, JR., THOMAS BOWMAN, SUSAN BOWMAN, JOHN BOWMAN and JOSEPH BOWMAN,

Petitioners,

vs.

CITY OF FRANKLIN, J.C. ZIMMERMAN ENGINEERING CORP., WASTE MANAGEMENT OF NORTH AMERICA, INC., and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS WASTE MANAGEMENT OF NORTH AMERICA, INC. AND WASTE MANAGEMENT OF WISCONSIN, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

No questions are presented that are appropriate for review by this Court pursuant to a writ of certiorari.

PARTIES INVOLVED

The parties involved are correctly stated in the caption. As required by Supreme Court Rule 29.1, the Waste Management respondents provide the following listing of their parent and non-wholly owned subsidiary corporations:

a. Waste Management of Wisconsin, Inc.
   Parent corporation: Waste Management, Inc.
   Non-wholly owned subsidiaries: None

b. Waste Management of North America, Inc.
   Parent corporation: Waste Management, Inc.
   Non-wholly owned subsidiaries: None

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The respondents, Waste Management of North America, Inc., and Waste Management of Wisconsin, Inc., respectfully pray that the petition for writ of certiorari be denied.

OPINIONS BELOW

Respondents Waste Management of North America, Inc. and Waste Management of Wisconsin, Inc. (hereinafter collectively referred to as "Waste Management") have no objections to petitioners' statement regarding the opinions below, except to note that: (1) the opinion of the District Court for the Eastern District of Wisconsin was not an "unpublished written opinion" but was rendered orally on the record at the conclusion of a hearing on Waste Management's motion to dismiss; and (2) there are substantial numbers of typographical errors in petitioners' reproduction of the opinions below in the appendices to their petition.

STATEMENT OF THE CASE

Waste Management does not object to petitioners' statement listing the parties and counts of petitioners' complaint, other than the characterization of Count IV of the complaint as a claim for interference with prospective business relations. Waste Management also does not object to petitioners' summary of the procedural history of the case, except to note that the "extensive written materials" allegedly submitted by Waste Management consisted solely of Waste Management's motion to dismiss and supporting briefs, and to object to the characterization of the district court's action as "summarily" dismissing petitioners' claims. The district court in fact gave detailed consideration to those claims but concluded they were without merit. The court granted Waste Management's motion to dismiss and *sua sponte* dismissed the

claims as to the other respondents, the City of Franklin ("City") and J.C. Zimmerman Engineering Corp. ("Zimmerman").

In their complaint, petitioners alleged that Waste Management negotiated an agreement with the City to connect Waste Management's Metro Sanitary Landfill to the City's Central City Sewer ("CCS") so as to enable leachate from the landfill to be deposited through a force main, to be constructed at Waste Management's sole expense, directly into the sewer system. Complaint, ¶¶ 15, 17(d), Exhibits 2, 11. A draft version of the agreement with the City, included as an exhibit to petitioners' complaint, indicated that Waste Management was to pay a $600,000 connection fee and, if necessary, pretreat the leachate to comply with the standards of the Milwaukee Metropolitan Sewerage District. *Id.*, Exhibit 11.

Before the agreement with Waste Management was finalized, construction of the CCS was approved by the City's Common Council after a public hearing, based on a publicly available assessment report prepared by Zimmerman. *Id.*, ¶ 17(b)-(d), Exhibits 5, 6, 9. Pursuant to the report, petitioners were assessed approximately $89,000 for a sewer laid in the public right of way abutting their property. Petitioners later challenged this assessment in state court and obtained a reduction of roughly $7,000. *Id.*, ¶ 21, Exhibits 12, 15.

Petitioners allege that they were also assessed approximately $51,000 for an additional segment of the CCS laid in an easement across their property, but were not given notice of this assessment, which they refer to as the "secret" assessment, by the City. *Id.*, ¶ 17(b)-(d). A

portion of Zimmerman's report included as an exhibit to petitioners' complaint states that assessments for sewers in easements would be deferred until the sewer became located in a public street or planned development. *Id.*, Exhibit 5. A second portion of Zimmerman's report also attached to petitioners' complaint shows the $51,000 assessment for the sewer with the notation, "Do not send out – these are deferred per agreement." *Id.*, Exhibit 6. Petitioners do not allege that the $51,000 assessment has ever been billed to or collected from them.

The Seventh Circuit Court of Appeals reviewed the district court's dismissal of petitioners' claims *de novo* and concluded that no claims upon which relief could be granted were stated against any of the respondents. The court therefore affirmed the district court's decision. The court denied respondents' motions for sanctions pursuant to Fed. R. App. P. 38 and Seventh Circuit Rule 38 but stated that the question of the frivolousness of the appeal was "a very close one." Opinion of Seventh Circuit Court of Appeals (reproduced as Appendix A to Petition for Certiorari) at 11 (hereinafter "Seventh Circuit Opinion").

SUMMARY OF ARGUMENT

Petitioners do not challenge the determination of the Seventh Circuit Court of Appeals that they failed to allege key elements of their federal claims against Waste Management, indicating that the decision to dismiss these claims was correct. As to their state law claims, the Court of Appeals decision is in harmony with the decisions of other courts of appeals and this Court in holding that a

district court has discretion to decide such claims on the merits after the federal claims in an action have been dismissed. Finally, the facts are unclear as to what materials, if any, were considered by the district court outside the petitioners' complaint. If the district court did consider extra-pleading materials submitted by petitioners and erred in not converting the motion to dismiss to a motion for summary judgment as a result, any such error was harmless.

Petitioners have identified no conflict among the circuits or with decisions of this Court or other reason why certiorari should be granted. Therefore, the petition for writ of certiorari should be denied.

ARGUMENT

I. PETITIONERS PRESENT NO QUESTIONS MERITING CERTIORARI REVIEW OF THE COURT OF APPEALS' DECISION THAT THEIR COMPLAINT FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED.

A. Petitioners Offer No Substantial Challenge to the Dismissal of Their Claims Pursuant to 42 U.S.C. §§ 1983 and 1985.

Petitioners' complaint attempted to state claims pursuant to 42 U.S.C. §§ 1983 and 1985(3) and under state law. The Seventh Circuit Court of Appeals held that no § 1983 claim was stated against Waste Management because the requirement of state action was not met, and that no § 1985 claim was stated because petitioners had

not alleged the requisite "class-based . . . animus." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

Petitioners do not challenge these determinations in their petition for certiorari. In fact, they do not even *mention* the § 1985 claim or the state action issue in their argument as to why the writ should be granted, much less identify a conflict with the decisions of other courts of appeal or this Court or other reason for the Court to grant certiorari as to these issues.

Petitioners also do not offer any reason for certiorari review of the Seventh Circuit's determination that they had failed to allege the deprivation of a right secured by the Constitution or laws of the United States, as required in addition to state action for a claim under § 1983. In their list of "Questions Presented," petitioners claim there is a conflict between the Second and Seventh Circuits regarding "municipal indifference to illegality," which they later allege could form the basis for a § 1983 claim. Petition for Writ of Certiorari (hereinafter "Petition") at i, 10. However, no such conflict exists.

The petitioners apparently rely on *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), in which the issue was whether acts by police covering up exculpatory evidence and committing perjury constituted "official policy" of a municipality so as to expose it to liability under 42 U.S.C. § 1983. In resolving this issue, the Second Circuit Court of Appeals set out guidelines for when a municipality's failure adequately to train its employees can amount to a "deliberate indifference to the rights" of others sufficient to satisfy the "official policy" requirement imposed by *Monell v. New York City Department of*

Social Services, 436 U.S. 658 (1978). No such issue was presented by the petitioners' claims or addressed by the Seventh Circuit. There is no conflict between the Seventh Circuit's opinion in the instant case and the Second Circuit's opinion in *Walker*.

Petitioners make no other argument of substance regarding their alleged deprivation of federal constitutional rights by respondents. Their argument that the validity of the so-called "secret" assessment should be decided by the state courts amounts to an acknowledgement that they had an adequate state remedy to correct any error in the assessment, as the Court of Appeals concluded. *See* Seventh Circuit Opinion at n.3.

B. Petitioners Have Failed to Identify Any Basis for Certiorari Review of the Seventh Circuit's Affirmance of the Dismissal of Their State Law Claims.

Petitioners assert that the Seventh Circuit was wrong in affirming the district court's dismissal of petitioners' pendent state law claims with prejudice, given the dismissal of their federal claims for failure to state a claim on which relief can be granted. The Seventh Circuit concluded that the dismissal with prejudice was not an abuse of discretion because the state law claims were meritless and could be decided only one way. Thus, it served the purposes of judicial efficiency for the court to dismiss the claims with prejudice. Seventh Circuit Opinion at 10-11.

The Seventh Circuit's decision applied the proper standard of review and does not conflict with decisions of this Court or other courts of appeal. For cases filed after

December 1, 1990, "supplemental jurisdiction" over state law claims is governed by 28 U.S.C. § 1367. Under this statute, the district court clearly had supplemental jurisdiction over petitioners' state law claims, which arose out of a common nucleus of operative fact with the federal claims. 28 U.S.C. § 1367(a); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349 (1988).

If the district court dismisses all claims over which it has original jurisdiction, the court "*may* decline" to exercise supplemental jurisdiction to decide the merits of related state law claims. 28 U.S.C. § 1367(c)(3) (emphasis added). The district court retains discretion to decide such pendent claims on the merits, and its decision in this regard is properly reviewed under an abuse of discretion standard, as the Seventh Circuit did in this case. *Carnegie-Mellon University*, 484 U.S. at 350, 350 n.7; *Taylor v. First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992); *Guidry v. Bank of La Place*, 954 F.2d 278, 285 (5th Cir. 1992).

Petitioners cite *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) for the "implicit" proposition that when all federal claims are dismissed before trial, the court "should" decline to exercise jurisdiction over pendent state claims. Petition at 8. However, in *Carnegie-Mellon University*, the Court stated that this is not a mandatory rule to be applied in all cases. *Carnegie-Mellon University*, 484 U.S. at 349-50, 350 n.7. *See also Guidry*, 954 F.2d at 285. The Sixth Circuit case cited by petitioners, *Gaff v. Federal Deposit Insurance Co.*, 814 F.2d 311 (6th Cir. 1987), also recognizes that the court may exercise its discretion to retain jurisdiction of state law claims after federal claims have been dismissed. *Id.* at 319.

The factors to be considered in such an exercise of discretion are "judicial economy, convenience, fairness, and comity." *Carnegie-Mellon University*, 484 U.S. at 350, 350 n.7. The Seventh Circuit properly considered these factors in affirming the dismissal of petitioners' state law claims with prejudice. Certainly as to Waste Management those claims were frivolous, given petitioners' failure to allege any conduct by Waste Management other than the fact that waste from Waste Management's property was to travel through the portion of the Central City Sewer constructed on petitioners' property. Judicial economy and convenience would not have been promoted by dismissing such patently meritless claims without prejudice, to have them resurface and require review by a state court later.

The Seventh Circuit's review of the district court's decision applied the proper standards and is in harmony with prior decisions of this Court and other courts of appeal. Certiorari should not be granted to review a decision that correctly applies an abuse of discretion standard to affirm the dismissal of claims that were obviously without merit.

II. NO ISSUES MERITING CERTIORARI REVIEW ARE PRESENTED BY THE DISTRICT COURT'S ALLEGED CONSIDERATION OF MATERIALS OUTSIDE THE COMPLAINT THAT WERE SUBMITTED BY PETITIONERS.

Petitioners assert that the district court considered "extensive written materials submitted by [Waste Management]" in ruling on Waste Management's motion to

dismiss, and therefore the court should have converted the motion to dismiss to a motion for summary judgment pursuant to Fed. R. Civ. P. 12(b) and disposed of it as provided in Fed. R. Civ. P. 56. It is not clear whether the district court's several comments about its review of the parties' "written submissions" were intended to refer to *briefs* or other documents. Whatever the district court was referring to, however, it was not materials outside the complaint submitted by Waste Management. In making its motion to dismiss, Waste Management did not submit or rely on any such materials but maintained at all times that it was moving to dismiss based on the complaint itself and its attached exhibits. Exhibits attached to the complaint are properly considered as part of the pleading on review of a motion to dismiss. *Hal Roach Studios v. Richard Feiner and Co.*, 883 F.2d 1429, 1441 n.18 (9th Cir. 1989); *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978).

It was *petitioners*, not Waste Management, who filed a number of exhibits outside of the complaint and relied on those exhibits in opposing Waste Management's motion to dismiss. *See* "Motion Exhibits" attached to Plaintiffs' Answering Brief Opposing Defendant's Motion to Dismiss, 9/6/91. Waste Management objected to the submission of these materials and explicitly asked the court *not* to consider them. *See* Waste Management's Reply Brief, 9/20/91, at 2-3.

Even if the district court is assumed to have considered exhibits outside the complaint that were submitted by petitioners, and to have erred in doing so, that error would be to the detriment of Waste Management, not petitioners. Indeed, the district court may in effect have

given petitioners a "double boon," by allowing them to supplement their complaint "while enjoying the benefit of the more deferential Rule 12(b)(6) standard of review." *Coyne v. City of Somerville*, 972 F.2d 440, 445 (1st Cir. 1992).

Petitioners cite no case that demonstrates a conflict with the Seventh Circuit's decision affirming the district court's dismissal of petitioner's claims. The only case cited that involved materials submitted by the *plaintiff* was also a case where the affidavit submitted, if used to supplement the allegations of the complaint, would have remedied its deficiencies. *See Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25-26 (2d Cir. 1988). In contrast, the district court in the instant case found that petitioners' documentation *contradicted* the allegations of their complaint.

The Court of Appeals conducted a *de novo* review of the dismissal of the complaint and concluded that petitioners had failed to state any claims upon which relief could be granted. In seeking certiorari review, petitioners, as discussed previously, make no argument whatsoever that the court's determination on two key points, the "class-based animus" required for a claim under 42 U.S.C. § 1985(3) and the state action required for a claim under 42 U.S.C. § 1983, was in error. Nor do they point to any evidence they would have offered on these points had they been given an opportunity to submit further materials. Thus, if the district court did err, petitioners have failed to identify how they were harmed by that error or how review by this Court could produce a different outcome. *See Miller v. Glanz*, 948 F.2d 1562, 1565-66 (10th Cir. 1991); *R.J.R. Services, Inc. v. Aetna Casualty and Surety Co.*, 895 F.2d 279, 280-81 (7th Cir. 1989).

III. CONCLUSION

Petitioners have not identified any conflicts between the decision of the Seventh Circuit in this case and decisions of this Court or other courts of appeals. Nor have they shown that the Seventh Circuit's decision departed from the usual course of judicial proceedings so as to warrant the exercise of this Court's power of supervision. Furthermore, petitioners do not challenge the Seventh Circuit's key determinations on the merits as to why no federal claims were stated by them against Waste Management pursuant to 42 U.S.C. §§ 1983 and 1985(3). In summary, petitioners have failed to present any reasons why this Court should exercise its discretion and select this case for review under its certiorari jurisdiction.[1]

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[1] Because the claims against Waste Management were not dismissed *sua sponte*, Waste Management has not discussed the issue raised by petitioners regarding such dismissal, but does not believe it is a question that should receive certiorari review under the circumstances of this case. The Court of Appeals' decision not to permit petitioners to introduce new evidentiary materials regarding Waste Management at the appellate court level was so obviously correct that the sixth question on petitioners' list of "Questions Presented" has also not been separately addressed.

Waste Management therefore respectfully requests the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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